

Conklin v American Biltrite, Inc.
2019 NY Slip Op 31983(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 190287/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

IN RE: NEW YORK CITY ASBESTOS LITIGATION

JOHN B. CONKLIN and NANCY ODELL,
- against -
AMERICAN BILTRITE, INC., et al.,
Defendants.

INDEX NO. 190287/2014
MOTION DATE 06/26/2019
MOTION SEQ. NO. 005
MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion for summary judgment by Columbia Boiler Company of Pottstown:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: [] Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Columbia Boiler Company of Pottstown's (hereinafter referred to as "Columbia") motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

Plaintiff John Conklin was diagnosed with esophageal cancer on October 10, 2013. His alleged exposure to asbestos - as relevant to this motion - was from his work removing Columbia boilers and related parts when he was either self-employed or a subcontractor, working on commercial and residential sites in and around New Paltz, Kingston, and Ulster County, New York from about 1974 through the mid 1980's (Mot. Exh. E, parts 1 through 3 of 4, and Opp. Exh. 1).

Mr. Conklin was deposed over a course of four days - on October 7-8, and November 5-6, 2014 (Mot. Exh. E, parts 1 through 3 of 4, and Opp. Exh. 1). He specifically recalled working on Columbia Boiler's products at a strip mall called Cherry Hill Plaza and during his work in Ulster County (Opp., Exh. 1, pgs. 909 -910). Mr. Conkin also specifically identified Black Creek Apartments - an apartment building in New Paltz - where he removed and had to break up six to eight insulated boilers from different manufacturers including Columbia, a dusty process that exposed Mr. Conklin to asbestos insulation and other materials (Mot. Exh. E (1 of 4), pg. 135-136).

Mr. Conklin was able to identify a Columbia boiler by the name embossed into a nameplate on the boiler. He testified that Columbia boilers were square shaped and varied in size, between two and four feet wide, three to six feet high, and four or five feet deep (Opp. Exh 1, pg. 912). He remembered that Columbia boilers had metal jackets with an asbestos lining on the other side of it. Mr. Conklin testified that about half of the Columbia boilers were packaged and the other half were sectional. He stated that the amount of sections on the Columbia boilers varied, and could have been two, four or six sections. He recalled that the fuel source for Columbia boilers he encountered were either natural gas or fuel oil (Opp. Exh. 1, pg. 913).

Mr. Conklin testified that he was exposed to asbestos from the removal of the old boilers. The piping that covered it and the unit itself was wrapped in asbestos, contained asbestos rope gaskets around the doors and had asbestos inside the access panels. He was able to visually tell the difference between asbestos insulation and some other insulation (Opp. Exh. 1, pg. 916-917).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Mr. Conklin testified that he smoked no more than a pack of cigarettes a day from the early 1970's through between 2000 and 2004, when he switched to cigars. He smoked filtered cigars from 2004 through 2013 (diagnosis of his esophageal cancer). Mr. Conklin testified that he was previously diagnosed with diverticulitis around 2012. He testified that he did not have any alcohol consumption related conditions, stomach or acid reflux problems (Mot. Exh. E (part 1 of 4), pgs. 221-222, 228, 232 and 810).

Plaintiffs commenced this action on August 22, 2014 to recover for damages resulting from Mr. Conklin's exposure to asbestos (See NYSCEF Doc. # 1). The summons and complaint were subsequently amended on October 3, 2014 to add parties that included Columbia (See Mot. Exh. B). Columbia served a timely Acknowledgement of Receipt of the Supplemental Summons and Amended Complaint (Mot. Exh. C).

Columbia now moves for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v City of New York*, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]); *Martin v Briggs*, 235 AD2d 192, 663 NYS 2d 184 [1st Dept. 1997]).

Columbia argues that plaintiffs failed to proffer any expert opinion or other evidence establishing general and specific causation that its products caused Mr. Conklin's esophageal cancer. Columbia relies on the February 9, 2019 report and April 15, 2016 affidavit of plaintiffs' expert, Dr. Brett C. Staggs, M.D. which concludes that Mr. Conklin's cigarette smoking and his exposure to asbestos at worksites were both contributing factors in the development of his esophageal cancer, in support of its argument that plaintiffs will not present any admissible evidence on causation.

A defendant cannot obtain summary judgment simply by "pointing to gaps in plaintiffs' proof" (*Ricci v. A.O. Smith Water Products*, 143 A.D. 3d 516, 38 N.Y.S. 3d 797 [1st Dept. 2016] and *Koulermos v. A.O. Smith Water Products*, 137 A.D. 3d 575, 27 N.Y.S. 3d 157 [1st Dept., 2016]). Regarding asbestos, a defendant must make a prima facie showing that its product did not contribute to the causation of plaintiff's illness (*Comeau v. W.R. Grace & Co. - Conn. (Matter of New York City Asbestos Litigation)*, 216 A.D. 2d 79, 628 N.Y.S. 2d 72 [1st Dept., 1995] citing to *Reid v. Georgia - Pacific Corp.*, 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept., 1995], *Di Salvo v. A.O. Smith Water Products (In re New York City Asbestos Litigation)*, 123 A.D. 3d 498, 1 N.Y.S. 3d 20 [1st Dept., 2014] and *O'Connor v. Aerco Intl., Inc.*, 152 A.D. 3d 841, 57 N.Y.S. 2d 766 [3rd Dept., 2017]). Columbia must unequivocally establish that Mr. Conklin's level of exposure to its asbestos containing products, was not sufficient to contribute to the development of his esophageal cancer (*Berensmann v. 3M Company (Matter of New York City Asbestos Litigation)*, 122 A.D. 3d 520, 997 N.Y.S. 2d 381 [1st Dept., 2014]).

Columbia's attempt to "point to gaps," in plaintiffs' evidence, including the February 9, 2019 and April 15, 2016 report of Dr. Brett C. Staggs, M.D., fails to establish a prima facie basis for summary judgment.

Columbia contends that summary judgment is warranted under *Parker v Mobil Oil Corp.*, 7 NY3d 434, 824 NYS2d 584, 857 NE2d 1114 [2006] and *Cornell v 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014]) because plaintiffs' experts are unable to establish general and specific causation. Columbia argues that its

expert, Dr. James McCluskey, M.D., M.P.H., Ph.D., F.A.C.O.E.M., an occupational medicine and toxicology specialist, establishes lack of causation.

General Causation:

In toxic tort cases, expert opinion must set forth (1) a plaintiff's level of exposure to a toxin, and (2) whether the toxin is capable of causing the particular injuries plaintiff suffered to establish general causation (*Parker v. Mobil Oil Corp.*, 7 N.Y. 3d 434, 448, *supra*).

Columbia argues that although some Columbia boilers may have contained small amounts of encapsulated chrysotile asbestos within furnace refractory, gasket, rope and board insulation materials, no causal relationship exists between the encapsulated chrysotile asbestos and the development of esophageal cancer. Columbia further argues that its products were not expected to release a significant dose of "free" asbestos fibers to create biologically "significant" asbestos exposure eliminating any general causation.

Columbia submits the October 29, 2018 report and related affidavit of Dr. James McCluskey, M.D., M.P.H., Ph.D., F.A.C.O.E.M., to establish the lack of causation (Mot. Exh. E). Dr. McCluskey cites to, and relies on a scientific method-formulating criteria for evaluating epidemiological data with respect to chemically induced injuries (Sir Bradford Hill, 1965) for determining general causation. Dr. McCluskey identifies Sir Bradford Hill's criteria as: "the strength of the human association; the consistency of the human association; the specificity of the human association; temporal relationships; biological gradient (exposure, dose, dose-response relationship); biological plausibility; coherence; experiment; analogy; and elimination of other possible causes (cofounders) or risk factors." (Mot. Exh. E, pg. 13). He references materials and standards from the United States Environmental Protection Agency ("EPA"), World Health Organization ("WHO"), and the International Agency for Research on Cancer (IARC), as relying on the same standard for testing as stated by Sir Bradford Hill. Dr. McCluskey states that at best the literature presents an inconsistent picture of any relationship between asbestos exposure and the development of esophageal cancer of all types. He concludes that there is no scientifically reliable evidence to suggest that Mr. Conklin's esophageal cancer was either caused by or contributed to by any Columbia boiler or related product and that the most likely cause is his history of cigarette and cigar smoking, and history of gastroesophageal reflux (Mot. Exh. E).

Plaintiffs in opposition rely on the June 4, 2019 report of Dr. David Y. Zhang, M.D., Ph.D., M.P.H., a professor of pathology and oncology and associate professor of preventive medicine at The Mount Sinai Medical Center, in New York (Opp. Exh. 2).

Dr. Zhang's June 4, 2017 report provides a general approach of occupational medicine, the types of asbestos fibers and assessment of the health effects. Dr. Zhang states that asbestos has been associated with many other cancers including esophageal cancer. He cites to his own research and more recent research after the IARC's report cited by Dr. McCluskey (cited in *the International Journal Cancer and Occupational Environmental Medicine*) finding a higher causal relationship between asbestos exposure and esophageal cancer in men. Dr. Zhang also cites to reports by OSHA and the IARC as demonstrating that there is no safe level of exposure to asbestos fibers. Dr. Zhang states that many international and federal agencies recognize asbestos as a potent carcinogen. He refers to studies that demonstrate the combined smoking of tobacco and exposure to asbestos confer a much higher risk of developing cancer. Dr. Zhang concludes, that although tobacco smoking is associated with an increased risk of esophageal cancer, the affect of asbestos exposure is also a factor and that Mr. Conklin's cumulative exposure to asbestos containing products, including boilers and related products, was a substantial contributing factor in his development of esophageal cancer (Opp. Exh. 2). It is plaintiffs' contention that Dr. Zhang's reference to boilers and related products includes Columbia's boiler related products.

Columbia argues that summary judgment is warranted under *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762, 986 NYS2d 389, 9 NE3d 762 [2014] because plaintiffs are unable to establish general causation. In *Cornell*, 22 NY3d 762, *supra*, the

defendant-corporation established a prima facie case as to general causation establishing generally accepted standards within the relevant community, of scientists and scientific organizations, that exposure to mold caused disease in three ways, none of which were claimed by the plaintiff. This case is distinguishable because plaintiffs' expert, Dr. Zhang is relying on some of the same scientists and scientific organizations as the defendants' expert in support of the arguments on general causation.

Summary judgment is a drastic remedy that should not be granted where conflicting affidavits cannot be resolved (*Millerton Agway Cooperative v. Briarcliff Farms, Inc.*, 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966] and *Ansah v. A.W.I. Sec. & Investigation, Inc.*, 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Conflicting testimony raises credibility issues that cannot be resolved on papers and is a basis to deny summary judgment (*Messina v. New York City Transit Authority*, 84 A.D. 3d 439, 922 N.Y.S. 2d 76 [2011]).

Columbia's expert Dr. James McCluskey relies on recognized studies and reports to establish that there is no causal relationship between the encapsulated chrysotile asbestos in Columbia's boilers and related products and Mr. Conklin's esophageal cancer. Plaintiffs' expert, Dr. David Zhang, also relies on studies and reports in part from the same scientific organizations, the IARC, EPA and the WHO, to establish that Mr. Conklin's exposure to the encapsulated chrysotile asbestos fibers in Columbia's boilers and related products can cause esophageal cancer. These conflicting affidavits raise credibility issues, and issues of fact on general causation.

Special Causation:

Columbia argues that its boilers and related products did not produce breathable dust to a level sufficient to cause Mr. Conklin's esophageal cancer, and thus plaintiffs are unable to establish special causation.

The Court of Appeals has enumerated several ways an expert might demonstrate special causation. For example, "exposure can be estimated through the use of mathematical modeling by taking a plaintiff's work history into account to estimate the exposure to a toxin;" "[c]omparison to the exposure levels of subjects of other studies could be helpful, provided that the expert made a specific comparison sufficient to show how the plaintiff's exposure level related to those of the other subjects" (*Parker v. Mobil Oil Corp.*, 7 NY3d 434, 448, 824 NYS2d 584, 857 NE2d 1114 [2006]). In toxic tort cases, an expert opinion must set forth "that the plaintiff was exposed to sufficient levels of the toxin to cause such injuries" to establish special causation (see *Parker v. Mobil Oil Corp.*, 7 NY3d 434, supra at 448]). In turn, *In re New York City Asbestos Litigation*, 148 AD3d 233, 48 NYS3d 365 [1st Dept. 2017] states that the standards set by *Parker* and *Cornell* are applicable in asbestos litigation.

Dr. McCluskey assesses Mr. Conklin's social history, which includes his history of smoking cigarettes and cigars and plaintiff, Nancy Odell's smoking history. He also assesses Mr. Conklin's work history, past medical history, his deposition testimony, alleged asbestos exposure, pathology, imaging, pulmonary function testing and incorporates the October 31, 2014 report of Dr. James A. Strauchen, a pathologist. (Mot. Exh. E, pgs. 2-12). Dr. McCluskey relies on published literature in the form of reports and studies from nineteen different experts to establish that the encapsulated chrysotile asbestos in Columbia's boilers and related products would not have been expected to release a significant dose of "free," asbestos fibers. He also states he reviewed a number of unidentified historical studies, related to waterproofing and mastic used on chimneys, which is relied on for his conclusion that there is no objective evidence that Mr. Conklin had biologically "significant" exposure to asbestos as a result of his work with Columbia's boilers and related products (Mot. Exh. E, pg. 14). He refers to medical literature finding esophageal cancer is closely linked to tobacco use, obesity, gastroesophageal reflux, Barrett's esophagus and achalasia, and that smoking cessation does not reduce the risk as quickly as it does with lung cancer. Dr. McCluskey states that he reviewed literature regarding the possible relationship between asbestos

exposure and the development of all types of esophageal cancer, citing to approximately twenty four reports or studies, and concludes that at best it presents an inconsistent picture. Dr. McCluskey further concludes that there is no scientifically reliable evidence to suggest Mr. Conklin's diagnosis of esophageal cancer was either caused or contributed to by the exposure to Columbia's boilers and related products (Mot. Exh. E, pg. 15).

Dr. Zhang discusses asbestos minerology and health effects, the relationship of asbestos to esophageal cancer, the history of asbestos-related disease, federal and international regulations on asbestos, visible dust, re-entrainment, and the ambient air level of asbestos fiber. He also assesses Mr. Conklin's occupational history, asbestos exposure, smoking history and medical history (Opp. Exh. 2, pgs. 4-16). Dr. Zhang relies on his own research and other scientific literature, as establishing that the average fiber concentrations in boiler repair and insulation in buildings ranged from 0.02 to 0.3 f/cc. He states that the removal of pipe and machinery insulation in boiler rooms, engine rooms, and brick storage spaces was 0.04-3.000 f/cc in the general area and 2.0 to 490 f/cc in breath zone (Opp. Exh. 2, pg. 12). Dr. Zhang summarizes Mr. Conklin's image study reports, pathology reports, and pathology findings. He concludes that the medical findings show Mr. Conklin's esophageal cancer is related to asbestos exposure and the cumulative exposure of each manufacturer's asbestos containing product (Opp. Exh. 2, pgs.17-19). Dr. Zhang further concludes that epidemiology studies have shown that esophageal cancer is strongly associated with asbestos exposure, creates a higher risk, and that there is more than sufficient evidence to conclude that Mr. Conklin's exposure to asbestos was a substantial contributing factor in the development of his esophageal cancer (Opp. Exh. 2, pgs. 19-20).

Plaintiffs are not required to show the precise causes of damages as a result of Mr. Conklin's exposure to Columbia's boilers and related products, only "facts and conditions from which defendant's liability may be reasonably inferred." The opposition papers have provided sufficient proof to create an inference as to specific causation for exposure to asbestos from Columbia's boilers and related products (Reid v Ga.- Pacific Corp., 212 A.D. 2d 462, 622 N.Y.S. 2d 946 [1st Dept. 1995] and Oken v A.C. & S. (In re N.Y.C. Asbestos Litig.), 7 A.D. 3d 285, 776 N.Y.S. 2d 253 [1st Dept. 2004]).

Plaintiffs cite to Mr. Conklin's deposition testimony, as showing that he identified Columbia's boilers and related products as a source of his exposure to asbestos. He described the manner of his exposure, specifically, Mr. Conklin testified that he was exposed to asbestos from the removal of the old boilers, the piping that covered it and the unit itself was wrapped in asbestos, with asbestos rope gaskets around the doors and the access panels. He also testified that breaking up Columbia boilers was a dusty process that exposed him to asbestos insulation and other asbestos containing materials (Mot. Exh. E (1 of 4), pg. 135-136 and Opp. Exh. 1, 916-917). Mr. Conklin's deposition testimony, when combined with the report of Dr. Zhang, has created "facts and conditions from which [Columbia's] liability may be reasonably inferred" (Reid v Ga.- Pacific Corp., 212 AD 2d 462, supra), and is sufficient to raise issues of fact, warranting denial of summary judgment.

ACCORDINGLY, it is ORDERED that Defendant Columbia Boiler Company of Pottstown's motion for summary judgment pursuant to CPLR §3212 to dismiss plaintiffs' complaint and all cross-claims against it, is denied.

ENTER:

Dated: July 8, 2019


MANUEL J. MENDEZ J.S.C. MANUEL J. MENDEZ J.S.C.

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